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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION,
Petitioner,

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY and SOLAR ELECTRIC COMPANY,
Respondents.

RESPONDENTS' BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The respondents are six Pennsylvania operating public service companies. They were, and still are, respondents in an investigation proceeding heretofore instituted by the Federal Power Commission (the petitioner here, hereinafter termed the "Commission") in which the Commission made certain orders which are considered later. Respondents were the petitioners in the Circuit Court of

Appeals for the Third Circuit and there obtained certain relief against the Commission, *which in no way affected the validity of the Commission's orders.* The investigation is still pending; having been *adjourned without day by the Commission.* The real issues of fact and law between the respondents and the Commission are still pending undecided before the Commission. The Court below did not in any way pass on those issues; but, on the contrary, preserved them for determination as real, live issues, as distinguished from moot or academic ones.

Questions Presented

A brief sketch of the facts,* later amplified, is sufficient to make intelligible the sole questions which were before the Circuit Court of Appeals, and which are now sought to be presented here:

In January, 1936, the Federal Power Commission instituted an investigation directed to respondents. On January 26, 1937, the Commission issued an order in furtherance of that investigation, by which order respondents deemed themselves aggrieved. In pursuit of their administrative remedy,** and as an essential statutory prerequisite** to a court review of that order, the respondents filed with the Commission a Petition for Rehearing, raising objections that the Commission lacked any fundamental or primary jurisdiction or power to make the order and conduct the investigation in pursuance thereof. Among its various other mandates, the questioned order of Janu-

* The facts are summarily restated in this brief because of distortions and erroneous assumptions contained in the statement thereof in the Commission's petition.

** Federal Power Act, Sec. 313.

ary 26, 1937, directed a hearing to be held. **The Commission adjourned that hearing without day; granted the Petition for Rehearing** and fixed a date for the hearings **under** the Petition for Rehearing. On that rehearing, despite all of petitioners' objections, the Commission proceeded to **assume and exercise** the jurisdiction which the Petition for Rehearing asserted it lacked, and proceeded to carry forward the very investigation under its questioned order exactly as if no administrative or court review thereof was sought, as if the hearing thereunder had *not* been adjourned without day, and as if no rehearing thereon had been granted. Furthermore, it was made plain that the Commission intended to continue this course of conduct.

To have completed the investigation under the guise of a rehearing would have destroyed respondents' administrative remedy and would have rendered moot any decision thereafter to be made on any review by the Circuit Court of Appeals as to the *power* to investigate. Respondents thereupon petitioned that Court to assert its powers under Section 262 of the Judicial Code (the "all writs" section), and to restrain the course of conduct deliberately followed and to be followed by the Commission, whereby the appellate jurisdiction of the Court would have been nullified and deliberately destroyed by the Commission's action.

Thus were presented two, and only two, questions to the Court below—the only questions on the decision of which the Commission can seek review through a writ of certiorari:

1—Did the Court of Appeals have general appellate jurisdiction to review the Commission's order of January 26, 1937?

2—If appellate jurisdiction existed, was the conduct of the Commission so destructive thereof that the Court should act under Section 262 of the Judicial Code to protect its appellate jurisdiction?

The first question is one of law; the second a question of fact.

Statutes Involved

The only statutes involved are Section 262 of the Judicial Code (USC, Title 28, §377) and Sections 313, 315 and 316 of the Federal Power Act (USC, Title 16, §825 l, n, and o).

The Facts

The petition for certiorari assumes as true and established so many facts and conclusions of law which are really in issue, that it becomes necessary in this brief to state the facts as they actually exist; and to state the issues as such, and not as proven foundations for an argument for the granting of a writ of certiorari.*

On January 6, 1936, the Commission issued an order of inquiry and investigation directed to the respondents (R. 23-24). This order was issued at the instigation of the Governor and Public Service Commission of Pennsylvania for the purpose of obtaining certain information desired by the Pennsylvania Commission, which the latter had no right to obtain under the State Law, for use in the prosecution of local proceedings to impose penalties against respondents and others (R. 5, 6, 23, 41).

* As hereinafter noted, the Commission has, for instance, *assumed* in its petition for certiorari the underlying point still at issue before it: that it has jurisdiction to carry on its investigation.

The purported purpose of the Federal Commission's investigation is to inquire into the propriety of certain contracts and working arrangements between respondents and third persons under which services were rendered, to inquire into the propriety of the charges made thereunder, and to ascertain the cost to such third persons of rendering the services for which charges were made (R. 23-26).

The jurisdiction and power of the Commission to conduct such an investigation was challenged at the outset. After an accounting report was made by the Commission's field examiners, the majority of whom were in the pay of the Pennsylvania Commission (R. 45, 51), and in furtherance of their recommendations, the Commission made the order of January 26, 1937 (R. 25-27), of which the respondents have been diligently attempting to obtain an administrative and court review—a review which the Commission, with equal diligence, has attempted to avoid and prevent, and is still doing so.

The order of January 26, 1937, was a definitive order directed to the respondents which, under the very terms of the Federal Power Act (§§315, 316), the respondents were constrained to obey under pains and penalties, civil and criminal. This order directed the respondents and some thirty-five other persons, firms and corporations to appear at a hearing on March 3, 1937, and "to present for the record * * * full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them," and any of the more than thirty other persons named in the order "controlled, directly or indirectly, by such person or persons." The respondents were further ordered to prepare and present certain specific information and data and to

assist the Commission in determining the facts as to the control of each of the persons named in the order, all as more fully appears in the order itself.

It appears of record (R. 19, 20) that the Commission has at no time objected to the rates, services or facilities offered by respondents in the conduct of their business, nor has the Commission or anyone else ever charged any of the respondents with any violation of the Federal Power Act or the rules or regulations promulgated thereunder.

The respondents believed, and still believe, that the Commission was utterly without power or authority to issue the order of January 26, 1937, and to protect and preserve their rights, undertook to obtain a review of the Commission's action. Such a review, and the procedure thereon, is provided for under Section 313 of the Federal Power Act (petition for certiorari, pp. 26-28). The filing of a Petition for Rehearing with the Commission is there made the appropriate administrative remedy, and the essential prerequisite to ultimate court review; for only those matters raised by a Petition for Rehearing may thereafter be considered by the Court.

The respondents promptly attempted to avail themselves of the administrative remedy thus afforded. That they have not yet exhausted that administrative remedy after fourteen months have elapsed, is not due to any delay on their part, nor to any attempt by the Court below to usurp the administrative function. **The "dilatory practice hardly to be justified on the basis of expedition"** (petition, p. 19) **is solely that of the Commission, which, had it not to this day studiously avoided making a decision, could long since have had the controversy set at rest.**

A proper Petition for Rehearing (R. 13-29) was duly filed by respondents. That Petition sets forth in clear and concise form the objections of the respondents to the Commission's order of January 26, 1937. **It cannot be stated too emphatically that these objections are jurisdictional objections of the most fundamental character.** They show that the Commission does not even have jurisdiction of the persons of three of the respondents; that the Commission has no statutory authority to carry on this investigation; that such authority could not constitutionally be conferred on the Commission. The objections show that the Commission has no authority to conduct proceedings for the *real* (and now admitted*) purpose of supplying information to the Pennsylvania Commission to aid it in its local action for penalties; nor for the *professed* purposes appearing by the Commission's orders. They are directed to the Commission's right to conduct *this* investigation, not to a question of its collateral jurisdiction to investigate in many other cases legally provided for. **These fundamental jurisdictional questions have never been determined by the Commission.**** **They**

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* Respondents asserted that the *real* purpose of the investigation was to supply information to a state commission, which it had no right to obtain under state law, to supplement its powers in a local proceeding to impose penalties under local law. This is now conceded, although prior to the filing of the Commission's sworn return, its first sworn document in the court below (R. 40-48), the Commission's counsel had disavowed any concern with the Pennsylvania matters.

** That the Commission has such jurisdiction is *assumed* in the petition for certiorari, just as it was assumed and exercised in the proceedings which gave rise to the application to the court below. See petition, p. 4. These assumptions appear even in the statement of Statutes Involved. (Compare references to Fed. Power Act, §§301(c), 307 and 311, at pp. 3, 4, 23-26 of the petition.) All this despite the fact that the Commission has never made a determination of its jurisdiction, and has only flouted respondents' objections, instead of deciding them.

were not before the Circuit Court of Appeals for determination, and were not determined by that Court. They are not now before this Court.

Upon the filing of the Petition for Rehearing, the Commission, first, **adjourned without day** the hearing fixed by the questioned order of January 26, 1937 (R. 3); second, **granted the Petition for Rehearing** (R. 49); and third, fixed April 14, 1937 as the date for the rehearing. But, despite the fact that the hearing under the investigation order had been adjourned without day and was never renoticed, the respondents soon discovered that the investigation was indeed continuing, but under the guise of the rehearing granted to determine legal issues raised by the aforesaid objections.

The respondents attempted to clarify the situation at the outset. Objections to evidence in furtherance of the investigation were followed by a request to the Trial Examiner to certify to the full Commission the question of whether or not the challenged power to investigate might be assumed to exist, and exercised in the teeth of the challenge—**in the very rehearing granted to consider the objections**. This action was to no purpose.

The petition for certiorari disingenuously suggests (p. 19) that all that was involved was a matter of objections to admissibility of evidence on which a trial examiner may have ruled erroneously, without review by the Commission. Far from it. A formal petition was filed with the full Commission objecting to the course of the proceedings (R. 29-35). The burden of the objections was, *not* that errors had been made in the admission of evidence on the rehearing, **but that the rehearing was a sham, a masquerade for the very investigation, hearings on which had been adjourned without day.** A recess was

taken so that the Commission could consider this formal petition. The Commission, after consideration, refused to take any action, and the sham rehearing—the investigation—continued daily. Thus respondents' efforts to exhaust administrative remedies succeeded only in having the Commission make clear the fact that it intended to proceed with its investigation, rather than to determine the objections that it was without power to do so.

It was, therefore, made obvious to the respondents that if the Commission investigated, and **after completing** the investigation under the guise of granting a rehearing, considered whether it had the power to carry on the investigation **already completed**, the entire matter would have been made **moot**. A review by the Commission itself, and, if necessary, by the Circuit Court of Appeals, of whether the Commission had the power to conduct an investigation which it had already conducted would have presented only an academic question. When it is remembered that the investigation was admittedly undertaken for the purpose of supplying information to the Pennsylvania Commission for use in the prosecution of local proceedings for the imposition of penalties, it is clear that a determination of the legal right to investigate after the investigation had been completed and the information supplied, became a matter of small moment.

On this state of the record before the Commission, respondents applied to the Court below. It is idle to assert, as is done in more than one place in the petition for certiorari, that the Court was called on to correct errors in admitting evidence, or "to sit with the Commission" to pass on proffered testimony and its relevance. The statement in the petition that one of the questions presented is the propriety of enjoining the proffer of evidence "in the course of an investigation" (p. 3), is

scarcely excusable. A casual examination of the record taken before the Commission in its so-called "rehearing" makes immediately apparent that it was the investigation indeed which was being pursued. **But the reality which the Court below fully grasped** (opinion, R. 50-54), **was the fact that the hearing was not supposed to be one in the course of the investigation; for such hearings had been adjourned by the Commission itself without day.**

REASONS FOR DENYING THE WRIT

(1) Petitioner has failed to present to this Court a proper and complete record of the evidence upon which the Circuit Court of Appeals made its decision.

The subject of respondents' application in the Court below was the *conduct* of the Commission in carrying on an adjourned investigation under the guise of a rehearing granted to consider objections to its jurisdiction to investigate. Exactly what the course of conduct was could only be described and characterized in respondents' petition to the Circuit Court, the same as it can only be described and characterized in this brief. *But the transcript of the record before the Commission showed*, far better than any mere description, *what the Commission's conduct was.* It was indisputable proof of it. And as such proof it was offered in evidence at the hearing before the Circuit Court of Appeals.

The Commission's strenuous objections to its admission were overruled. The Circuit Court's judgment recites consideration of the Commission's record as the basis of its decision (R. 62). The Clerk of that Court certified that record as part of the proceedings in his Court.

But the Commission, in preparing the transcript to be filed in this Court, caused to be printed everything **except**

respondents' proof below, the record before the Commission.

Not only was the record not printed, but the Solicitor General, representing the Commission, *refused* even to agree that it is part of the record to be considered by this Court on the certiorari application, and *refused* to print it even if certiorari were granted.* Furthermore, it was represented to this Court as a basis for a motion by the Commission to shorten the extended time to file this brief, that "the testimony before the Commission was not a part of the record in the Circuit Court of Appeals and therefore is not a part of the record in this Court or required to be printed as such."**

That that representation is incorrect† is established beyond question by the certificate of the Circuit Court of Appeals for the Third Circuit, that the record before the Commission was offered in evidence, admitted in evidence, considered in the disposition of the case, and included in the record certified to this Court.‡

The printed "Transcript of Record" filed with the petition herein is incomplete. The diminution of the record was called to the attention of the Commission and to the Solicitor General. Effort was made to have it corrected. Correction was refused by the Solicitor General on behalf of the Commission.*

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* See telegram from Solicitor General to respondents' counsel, printed at page 13 of respondents' reply to the Commission's motion to shorten the time to file this brief, filed April 25, 1938.

** Commission's motion to shorten time to file this brief, page 4.

† This statement ignored the affidavits to the contrary of three of respondents' counsel who were present at the hearing in the Circuit Court of Appeals at which the record was admitted in evidence.

‡ A certified copy of the certificate is on file in this Court, a copy thereof appears at pages 9 and 10 of respondents' reply to the Commission's motion to shorten the time to file this brief, and is printed as an Appendix hereto.

This Court, it is respectfully submitted, should refuse to entertain such a wilfully defective application for a writ of certiorari.

(2) Neither the legal rights, nor the administrative processes, of the Commission, are injured by the decision of the Circuit Court of Appeals.

The Circuit Court of Appeals correctly apprehended the character of the proceedings before the Commission, and respondents' petition below with respect thereto. Plainly, that Court did not consider the merits of the objections raised by the Petition for Rehearing. Plainly, it did not consider the petition to it as calling for a mere ruling on proffers of evidence. It considered, and rightly so, that there was called to its attention an arbitrary and deliberate course of conduct, which was not only highly injurious to the respondents in their pursuit of the administrative remedy provided by Act of Congress, but which at the same time nullified the Circuit Court's appellate jurisdiction, likewise provided by Act of Congress, to review seasonably raised objections to the fundamental jurisdiction of the Commission.*

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* The Commission has been conveniently inconsistent in characterizing its "rehearing". The transcript of the record before it shows many instances where the "rehearing" to consider respondents' objections was admitted to be a hearing in furtherance of the adjourned investigation, which in fact it was. This seems to be its present position (petition, p. 3; Commission's motion, filed April 22, to shorten extended time to file this brief, p. 2). Yet occasionally it is equivocally stated that the "rehearing" was not a hearing on the investigation, but one to determine jurisdiction (petition for certiorari, p. 7; R. 48). The record before the Commission, which was in evidence below, but which the Commission refused to have printed, shows that this was not so. See opinion below, R. 52; stenographic transcript of testimony before the Commission, *e. g.*, at pp. 305, 308-9, 326-8, 387-8, 419-20, 439, 441, 464-6, 473-4, 497-8, 505-7.

The Court found that it was the duty of the Commission, having granted the Petition for Rehearing, to determine the objections raised thereby. The mandate of the Court did no more than state a simple guide for carrying out that administrative duty which no reasonable administrative body could or should object to following.

The decree did not jeopardize the progress of the Commission's investigation, as the petition for certiorari asserts (p. 20). **Under that decree the Commission may proceed *instanter* to a determination of the question of jurisdiction; and if it determines that it has jurisdiction, it may then proceed *instanter* with the investigation itself. The Commission is in no wise injured by the decision; it is unnecessary that this Court consider the validity thereof.**

It is immediately apparent, therefore, that the decree of the Court below was in effect no more than an interlocutory ruling restraining the Commission from frustrating the respondents' administrative remedy and the Court's appellate jurisdiction, and preserving as live issues the objections made by respondents in their Petition for Rehearing, as and when it may become necessary for them to take an appeal from the order that will ultimately be made by the Commission. **The decree of the Court below in no sense terminated the controversy between the Commission and respondents, nor was it final in character.**

This Court has repeatedly held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree".* See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251 (1916); *American Construction Co.* v. *Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372 (1893); *The Conqueror*, 166 U. S. 110 (1897); and *City and County of Denver* v. *New York Trust Company*, 229

* Emphasis and parenthetical matter within quotations throughout, ours.

U. S. 123 (1913). This Court has repeatedly warned that **the circumstance that the decision of the Circuit Court of Appeals does not finally terminate the controversy is "a fact that of itself alone furnishes sufficient ground for the denial of the application".** *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.* (*supra*).

(3) The decision below is neither a departure from the usual course of judicial proceedings nor a departure from the principles governing orderly review of administrative action.

From what has already been stated, it is apparent that the decision below was designed to promote orderly procedure. If the simple procedure required by the Circuit Court's judgment had voluntarily been followed by the Commission, a review of respondents' jurisdictional objections could long since have been had before the Commission, and, if adversely decided by it, before the Circuit Court of Appeals.

The Commission cites in its petition a number of cases* to support its claim that the decision below violates established canons of judicial administration. None of them does so. Principally relied on is *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45 (1922). In that

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* *Myers* v. *Bethlehem Shipbuilding Corp.*, No. 181, Oct. Term 1937.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927).

Bradley Lumber Co. v. *National Labor Relations Board,* 84 Fed. (2d) 97, (1936).

Macfadden Publications v. *Federal Trade Commission,* 37 Fed. (2d) 822 (1930).

Chamber of Commerce v. *Federal Trade Commission,* 280 Fed. 45 (1922).

case the plaintiff attempted to obtain by certiorari from a Circuit Court of Appeals a *reversal* of action taken by the Federal Trade Commission overruling objections to an order made by it. The statute under which the order in question was made contained no provisions similar to those of the Federal Power Act for the review of Commission orders. The Circuit Court had no jurisdiction to review, and certiorari proceedings did not, therefore, come within the powers which under Section 262 of the Judicial Code may be exercised to protect an existing appellate jurisdiction. The plaintiff's action was nothing more than an attempt to invent what was correctly recognized as an unauthorized substitute for a non-existent appeal.

The respondents sought no such unauthorized remedy as did the plaintiff Chamber of Commerce. The majority of the Court below recognized that no appeal was before it, despite the efforts of the Commission, now as before, to force argument on the objections still resting undecided before it. The Court below properly stated the situation when it said:

> **"These proceedings were taken so that the questions would not be moot if and when they come here"** (R. 53).

Here is the distinction between the case at bar and the many cases, some of which are cited in the Commission's petition, which correctly hold that administrative remedies must be exhausted before judicial review may be had. There is no conflict. In all of these cases an attempt was made to substitute judicial process for administrative process, to the destruction of the latter. The decision below, on the contrary, far from destroying the administrative process, *preserves* it, and expressly refuses to assume a

jurisdiction to decide matters committed to the administrative body for determination. Said the Court:

> "Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition [for Rehearing]. We are going to remand the case for such determination.
> * * *
> In remanding the case, we express no opinion on the merits on the questions to be decided." (R. 53)

Just as this Court has refused to countenance judicial action destructive of administrative jurisdiction (*Myers* v. *Bethlehem Shipbuilding Corporation,* Oct. Term 1937, No. 181, decided January 31, 1938), so also did the Court below refuse to countenance a perversion of administrative action which was destructive of the judicial jurisdiction. In this there is no more novelty than in the abuse which required the action to be taken. In principle there is nothing novel or unprecedented whatever.

There is surely nothing unprecedented in the protection by the Circuit Court of Appeals of its appellate jurisdiction. Judicial Code, §262. *McClellan* v. *Carland,* 217 U. S. 268 (1910); *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945 (1904); *Frankel* v. *Woodrough,* 7 Fed. (2d) 796 (1925). Its decision and order have done no more than this. It cannot be that such a decision, which prevents what otherwise would be an uncontrolled abuse and assumption of powers by an administrative body, can unsettle the law.

(4) The decision below is not in conflict with decisions of this Court nor with the decisions of the Courts of other Circuits.

The decision is entirely consonant with this Court's recent reiteration of the fundamental rights guaranteed by the Constitution, but so readily subject to invasion by administrative bodies. In *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1 (1936), this Court stated that arbitrary power and the rule of the Constitution cannot co-exist. And:

> "To escape assumptions of such power on the part of the three primary departments of the government, is not enough. **Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well.**" (p. 24)

Nevertheless, as a strenuously urged reason for the granting of its petition, the Commission urges the "general importance" of the decision below because it conflicts with the Commission's contention that there may be no intervention in the progress of administrative proceedings. The Circuit Courts of Appeals may protect their appellate jurisdiction from destruction by inferior judicial bodies, surely; but not, proclaim the Commission's arguments, from destruction by an administrative body. This sacrosanct claim to an irrebuttable presumption of *omne rite acta* is consonant with the same stubborn insistence that has characterized the Commission's proceedings throughout—the insistence that, despite the challenge of the respondents' objections to its jurisdiction, the Commission may arbitrarily assume such jurisdiction, and, having assumed it, may and should proceed with its exercise unfettered by the possibility of judicial scrutiny. It is difficult to conceive how such an argument can appeal

to the discretion of this Court, which said in *Jones* v. *Securities and Exchange Commission* (*supra*), concerning an unauthorized investigation:

> "And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments —even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties." (p. 24)

and further (p. 27):

> "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light."

The Commission argues that because the Court below determined that it had appellate jurisdiction with respect to the Commission's order of January 26, 1937, its decision fails to follow the applicable decisions of this Court, and is in conflict with decisions of the Courts of Appeals of other Circuits. But the Commission fails to show wherein such conflict lies. There is none.

In the first place, there is no question but that Section 313 of the Federal Power Act does in terms provide for a review of the order in question, as well as any other order of the Commission. No exception is made to orders which the Commission characterizes as "interim" or "procedural". To make such an exception would require judicial legislation to supply what the Congress did not say. Such action has been uniformly condemned. *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269 (1929).

Nor can it be said that there will be no transcript of record on which to base a review. In suggesting that argument (petition, p. 12) the Commission is seemingly forgetful of its later correct statement (petition, p. 19) that before a review may be had, administrative remedies must be exhausted. In that process, in every case will be developed an ample record. Surely, there is one here, as this Court could more readily see, had it been printed as the rules of this Court require.*

In the second place, there is no conflict in principle between the decision below and decisions of this Court or Courts of other Circuits.

The case principally relied upon by the petitioner is *United States* v. *Illinois Central R. Co.*, 244 U. S. 82 (1917). Even a tortured construction of the facts fails to make the *Illinois Central* case an authority for the petitioner. In an effort to do so, however, the Commission attempts to establish that its order of January 26, 1937,

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* Compare, *American Sumatra Tobacco Co.* v. *Securities & Exchange Commission*, 93 F. (2d) 236 (App. D. C., September 1937) where the Court rejected a Commission argument that, because there might be no record, an "interim" order was not reviewable under the provisions of the Securities Exchange Act (§25(a)) similar to those of Section 313 of the Federal Power Act.

was not an order at all. In the *Illinois Central* case the Court had under consideration a certain notice of hearing issued by the Interstate Commerce Commission, which the Court refused to review on the ground that it "had no characteristics of an order, affirmative or negative". As the Court said, it was not "one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree". Merely reading the I.C.C. notice sought to be reviewed immediately reveals that it bears none of the characteristics of the Federal Power Commission order here in question. So that this may be completely clear, the I.C.C. "order" is quoted *in full:*

> "The above-entitled cases are assigned for hearing October 1, 1915, 10 o'clock a.m., at Hotel Jefferson, St. Louis, Mo., before Examiner Wilson.
>
> By the Commission."

Contrast this three-line notice, which commanded no one to attend the hearing, and, as was pointed out by the Court, constrained no one to obedience, with the lengthy order here under consideration (R. 25-27). The Commission's order is entitled as such, is referred to in itself and in the minutes of the Commission as an *order,* requires the attendance of parties, constrains them to obedience under pains and penalties, both civil and criminal (Federal Power Act, §§315, 316), and orders and directs them not only to appear, but to furnish information and data, to take definite action, and to be investigated. It has recitals, following which is a mandate, prefaced by the words "Now, Therefore, *it is ordered*". As was stated by the Court below (R. 53):

> **"The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, * * *."**

Under the *Illinois Central* case, the Commission's leading authority, therefore, the Commission's order of January 26, 1937, was exactly what the Commission designated it and intended it to be, namely, an order. It is still that and nothing more, despite the Commission's attempted investiture of it with chameleon-like qualities, which enable it to start life as an order, so denominated, graduate into something "in the nature of a subpoena duces tecum", then make the complete change into "such a subpoena", subject to construction, rules and authorities as such, and quickly, within the short space of two lines of the petition for certiorari (p. 14) resume its character as an order because its usefulness as a subpoena has ended.

In a more or less orderly retreat from the untenable position that the order of January 26, 1937, is a subpoena duces tecum and, therefore, not reviewable, it is contended that the order is not reviewable because, although an order, it is "preliminary". *Jones* v. *Securities and Exchange Commission,* 79 Fed. (2d) 617 (1935), on which the Commission relies, is no authority. That was a decision on the consolidation of two proceedings, the first brought by Jones to review an order of the Securities and Exchange Commission refusing his application to withdraw a registration statement, and the second brought by the Commission to enforce his attendance as a witness. The Second Circuit Court of Appeals denied the review requested by Jones on the ground that the order was not appealable, and granted the Commission's application. Certiorari was denied by this Court in Jones' case, but at the same time was granted in the proceedings instituted by the Commission, which presented the entire controversy. This Court, at 298 U. S. 1, reversed the Circuit Court of Appeals, and held the

order refusing to permit withdrawal of the registration statement to be arbitrary, illegal and unconstitutional, and directed that the subpoena be quashed. To argue that the Securities and Exchange Commission's order was not reviewable is idle, when the effect of this Court's decision was **both a review and a reversal.**

(5) The petition fails to show any "special and important reasons" which the rules of this Court* require for the granting of the writ.

As has herein been shown, there is no conflict between the decision below and decisions of the Courts of Appeals of other Circuits. The decision is **not** one of an important question of federal law which has not been, but should be, settled by this Court. Nor has the Court below decided a federal question in any way in conflict with applicable decisions of this Court. There is no departure from the accepted and usual course of judicial proceedings, much less such a departure as to call for the exercise of this Court's power of supervision.

The basic contentions of the Commission throughout this proceeding, and the contentions upon which its application is based, are fallacies of law and fact. They have been recognized as such by the Court of Appeals. They merit no more favorable consideration in this Court.

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* Rule XXXVIII.

(6) The Commission has denied to respondents the minimal requirements of fair play which must be afforded by all administrative bodies; and the Commission is estopped by its own representations and conduct from making any claim of injury by the decision below.

This Court very recently had occasion to point out, in *Morgan* v. *United States,* October Term, 1937, No. 581 (decided April 25, 1938):

> "**The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority.** On the contrary, it is in their manifest interest.
>
> "For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, **they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.**"

Throughout these proceedings the Commission has proceeded with what may be characterized as a studious disregard of even the simplest principles of fair play. In this regard it is important to remember that **the Commission granted the Petition for Rehearing** by which respondents' objections were raised; **granted a rehearing** on a day certain; and **adjourned** the main proceeding, **the investigation, without day.**

It then proceeded, overriding all of the respondents' objections and in utter disregard of judicial tradition, **to enter upon the very investigation which it had adjourned, and to make a mockery of the rehearing which it had granted.**

Naturally, with such a record, the Commission fought vigorously to prevent the transcript of its proceedings from being admitted in evidence in the Circuit Court of Appeals, and when overruled on this, it seems equally averse to having this Court consider the record, which shows what the Commission's conduct has been and what it has done and has been attempting to do to the respondents. So averse was the Commission that not only did it fail to comply with this Court's rules and print the full record of the proceedings below, but, moreover, it represented to this Court that the transcript of its proceedings was no part of the record below and therefore not a proper part of the record in this Court. When respondents properly obtained an extension of time to see if some arrangement could be made so that this Court would have the entire record before it, the Commission wrongfully charged the respondents with seeking to delay the determination by this Court of the matter; although all of the Commission's efforts to date have been centered on making moot any judicial determination of its fundamental right to make the investigation. The Certificate of the Circuit Court of Appeals filed with this Court (printed as an Appendix hereto) shows that there can be no possible mistake about the record.

The decision of the Court below requires no more than a conformity with the representations of the Commission which were implicit in its action. The Court has directed the Commission to do exactly what the Commission itself *represented* that it proposed to do—that is, to allow respondents their administrative remedy and to consider and decide respondents' jurisdictional objections; in the meantime, to stay the investigation.

Under the circumstances, it is respectfully submitted that no possible injury can be done in denying the petition

for certiorari made on a wilfully defective record, and leaving the Commission where it placed itself, viz., subject to a decree which requires no more than that the Commission follow the proper procedure which the Federal Power Act contemplates, and which the Commission itself originally proposed and represented that it would follow.

The petition for certiorari should be denied.

Respectfully submitted,

WALTER BIDDLE SAUL,
Counsel for Respondents.

TRAVIS, BROWNBACK & PAXSON,
SAUL, EWING, REMICK & SAUL,
of Counsel.

April 28, 1938.

Appendix

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

FEDERAL POWER COMMISSION, PETITIONER

v.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, and SOLAR ELECTRIC COMPANY

Certificate

AND NOW, to wit, April 23, 1938, upon motion of Walter Biddle Saul, counsel for the respondents, the Circuit Court of Appeals of the United States for the Third Circuit, hereby certifies that the record of the hearings before the Federal Power Commission were offered in evidence before this court and admitted in evidence and the said record was considered by this court in the order which it made in disposing of the petition of the Metropolitan Edison Company, et al, and the said record of the proceedings before the Federal Power Commission were certified to the United States Supreme Court by the Clerk of this court as part of the record which was before this court.

PER CURIAM
(Sgd.) BUFFINGTON
Senior Circuit Judge

Received & Filed, April 23, 1938
WM. P. ROWLAND,
Clerk

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